

CRIMINAL MISC. APPLICATION NO. 2155 OF 1991.

Date of decision: 20.3.1996.

For approval and signature

The Honourable Mr. Justice R. R. Jain

Mr.A.D. Shah, advocate for petitioners.

Mr. S.R. Divetia, A.P.P. for respondent No.1.

Mr. R.S. Pandya, advocate for respondent No.2.

1. Whether Reporters of Local Papers may be allowed to see the judgment?-No
2. To be referred to the Reporter or not?-No
3. Whether their Lordships wish to see the fair copy of judgment? -No
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder? -No
5. Whether it is to be circulated to the Civil Judge? -No

Coram: R. R. Jain, J.

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March 20, 1996.

Oral judgment:

Being aggrieved by the process issued by learned Judicial Magistrate, First Class (Municipal) Court, Vadodara, taking cognizance in Criminal Case No.976 of 1991 for offence under Section 420 read with Section 34 of IPC on complaint filed by respondent No.2, the petitioners have filed this application under Section 482 of Cr.P.C. for quashing.

In order to appreciate rival contentions, it would be

apposite to narrate briefly facts of the case as under:

Respondent No.2, original complainant, is father of Vijay Vasantrao who was married to petitioner No.3, Sulabha Vishwasrao Ghatage. Petitioner No.1 is father and petitioner No.2 is mother of petitioner No.3 and petitioner No.4 is sister of petitioner No.3.

It is the case of respondent No.2 that though the petitioner No.3 at the relevant time was suffering from epilepsy, this fact was not disclosed when the marriage was settled and solemnized and, thus, the petitioners jointly are responsible for misrepresentation of fact and committing fraud on respondent No.2. As alleged, the marriage took place on 23.12.1988, and thereafter the petitioner No.3 joined the son of respondent No.2 at the matrimonial home. After joining him at the matrimonial home she got epileptic attack in May 1989. They took her to their family doctor and appropriate treatment was given. It is further alleged that owing to some indifference petitioner No.3 could not march in step together with her husband, who is son of respondent No.2, so ultimately, left matrimonial home on 14.5.1989 in company of rest of the petitioners. Thereafter on 21.1.1991 all the petitioners came at his residence and took away all ornaments and clothes belonging to petitioner No.3. It is further alleged that while taking ornaments and clothes it was disclosed by petitioner No.3 that since long she was suffering from said disease which is not curable and for all the times to come in the whole life will have to take appropriate treatment. It is in this background that the complaint is filed alleging cheating, for the offence under Section 420 read with Section 34 of IPC.

The learned Magistrate, on facts, took cognizance of the matter and issued process vide order dated 21.2.1991. Aggrieved by the order of taking cognizance the petitioners/original accused have approached this Court under Section 482 of Cr.P.C.

It is true that powers under Section 482 of Cr.P.C. are inherent powers of High Court and have to be exercised sparingly having regard to the facts and circumstances of the case so as to avoid abuse of process or to secure the ends of justice. Keeping in mind this cardinal principle of law, the facts will have to be appreciated.

While considering application under Section 482 of Cr.P.C. it has to be borne in mind (i) whether manifestly there is legal bar in prosecuting the matter

or allegations made therein, if taken on its face value, (ii) whether constitute offence as alleged, and (iii) the Court has also to see that in the case where allegations do constitute offence whether supporting evidence has been produced or not. If at all supporting evidence has been brought then whether does it prima facie corroborate the allegations and prove the charge. Of course, this is a question to be considered on merits and would vary from case to case depending upon facts. Mr. A.D. Shah, learned advocate for the petitioner, has raised preliminary question of maintainability of the complaint. It is true that question of maintainability would not be purely a question of facts but is a mixed question of law and facts and would be necessary to decide at this stage so as to secure the ends of justice. Admittedly, the dispute in question is matrimonial one and if the allegations made in the complaint are true then aggrieved party would be the husband, the son of respondent No.2 and if at all any fraud or misrepresentation is committed then the parties to the matrimonial relations would be the aggrieved party who only can knock the doors of Court for seeking justice. In this case, admittedly, the husband of petitioner No.3 has been kept in backdrop and the father, respondent No.2, has come in picture making allegations of misrepresentation and fraud. In my view, in such case, a party one who is not aggrieved, has no right to initiate proceedings in respect of so-called offence or wrong or initiate proceedings and it would amount to abuse of process of law. Since no personal wrong shall be deemed to have been committed to the respondent No.2, has no right to seek remedy invoking criminal jurisdiction. Therefore, the circumstances manifestly operate as bar to maintainability of proceedings. Despite this fact if the trial court has taken cognizance and proceeded with the matter, has done so in abuse of process of law and is patently erroneous.

To constitute offence under Section 420 of IPC one of the ingredients would be to induce dishonestly any person who owing to such inducement part with property or to make alteration or destroy the whole or part of the valuable security. On bare reading of complaint, nothing can be culled out that the petitioners made any inducement muchless with dishonest intention. Mr. Pandya, learned advocate for respondent No.2, has not been able to show parting with property owing to any such dishonest inducement alleged to have been practiced by the petitioners. In view of this fact, I am of the view that prima facie the allegations made in the complaint do not constitute offence as alleged and, therefore, no

cognizance could be taken by the trial Court.

Mr. Pandya, learned advocate for respondent No.2, has also argued that the complaint has been wrongly mentioned as under Section 420 read with Section 34 of IPC and in fact this ought to have been under Section 496 of the IPC as the facts alleged would constitute offence under Section 496 of IPC. At this stage, while dealing with the question of issuance of process I am not concerned as to how the complaint is captioned and/or whether the allegations made therein are sufficient to constitute case under particular section mentioned therein. The question before this court is for quashing the process in which the trial court has taken cognizance. The trial court has taken cognizance for the offence under Section 420 read with Section 34 of IPC which is not supported by the allegations made in the complaint. Consequently, alternative submission does not find favour with the Court.

Even assuming that the alternative submission needs consideration, I am of the view that a bare reading of the complaint, the allegations do not constitute any offence as contemplated under Section 496 of IPC. In order to appreciate this contention, reference will have to be made to provisions of Hindu Marriage Act. Section 11 of the Hindu Marriage Act deals with void marriages and Section 12 deals with voidable marriages. As provided in Section 11 of the Act, any marriage solemnized in contravention of any of the conditions specified in clauses (i), (iv) and (v) of Section 5 of the Act would be void marriage amounting to nullity ab initio i.e., not enforceable at all, whereas any marriage solemnized in contravention of conditions specified in clause (ii) of Section 5 would be voidable marriage at the option of aggrieved party. In this view of fact, till option is not exercised the marriage will be legal and valid. Section 496 of Cr.P.C. provides that whoever, dishonestly or with a fraudulent intention, goes through the ceremony of being married, knowing that he is not thereby lawfully married, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine. So, to constitute an offence under Section 496 of Cr.P.C. condition precedent would be that the marriage solemnized is not lawful and has been undergone dishonestly with fraudulent intention. As discussed above, even if allegations made in complaint are true then the marriage in question would be voidable as would be in contravention of clause (ii) of Section 5 of Hindu

Marriage Act. A voidable marriage is always a legal marriage till option is exercised by aggrieved party. Therefore, Section 496 of I.P.C. cannot be attracted. Further, essentially the dispute between the parties is in civil nature, governed by provisions of Hindu Marriage Act and any endeavour to seek remedy for civil wrong by invoking criminal jurisdiction would be abuse of process of law.

Mr. Pandya for the respondent has No.2 invited my attention to the decision of the Supreme Court in the case of K.M. Mathew v. State of Kerala, AIR 1992 SC 2206. In that case power of Court to drop the charges at any stage of proceedings is discussed. In my view, on facts, ratio of that decision is not applicable to this case. Referring to para 8 of the judgment, it is submitted that when alternative remedy is available power under Section 482 should not be exercised. It is true that in this judgment, as the trial court dropped the charges, the aggrieved party moved the High Court and the High Court set aside the order thereupon the matter was taken to Supreme Court. The Supreme Court held that process against him ought not to have been issued but time and again the Supreme Court has, in catena of judgment, observed that observation made by it should not be read in isolation and divorced from the context in which it is made as is likely to be misconstrued. Admittedly case before the Supreme Court was not with regard to quashing but dropping the charge by the learned Magistrate and on facts and circumstances, the case before the Supreme Court and the present one being different, in my humble view, observations made by Supreme Court would be of no assistance to respondent No.2.

As regards exercise of powers under section 482 Mr. Pandya has made reference to the decision of the Supreme Court in the case of State of Maharashtra v. Ishwar Piraji Kalpatri, (1996) 1 SCC 542. In that case it has been held that the inherent powers should be exercised in extraordinary circumstances and while doing so the court should not embark upon an inquiry as to probability, reliability or genuineness of the allegations made therein. While exercising this extra ordinary jurisdiction the court has to bear in mind whether on a bare reading of the allegations, prima facie case as alleged therein is made out or not. I am respectfully bound with the ratio laid down by the Apex Court in this judgment. But keeping in mind the limitations of the court while exercising inherent powers and jurisdiction under extraordinary circumstances I have observed in the

preamble of this judgment that the powers under Section 482 are to be exercised sparingly in extra ordinary circumstances only with a view to avoid abuse of process of law and securing ends of justice. This judgment lays down guidelines but not a jacket type formula and, therefore, application under Section 482 depends upon facts and circumstances of individual case. In my view, the peculiar facts and circumstances of this case warrants interference by this court for exercise of inherent jurisdiction under Section 482 of Cr.P.C.

For the reasons stated above, the application is allowed. The process issued by the trial Court is quashed. Interim stay stands vacated. Rule made absolute accordingly.

At this stage, Mr. Pandya, learned advocate for respondent No.2, requests for stay of this order for six weeks with a view to enable respondent No.2 to approach Supreme Court. In absence of express objections of Mr. A.D.Shah for petitioners, the request is granted. Operation of this order is stayed till 30.4.1996.